In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, et al.,
Petitioners,

vs.

APOLINAR NAVARETTE, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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The petitioners, Raymond K. Procunier, et al., respectfully pray that a writ of certiorari issue to review the judgment and majority opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 9, 1976.

OPINION BELOW

The opinion of the Court of Appeals, holding prison officials to be liable in money damages under the Civil Rights Act (42 U.S.C. §1983) for mere negligent con-

duct, is reported at 536 F.2d 277 and is attached hereto as Appendix A.

JURISDICTION

The Court of Appeals order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc,* attached hereto as Appendix B, was filed on July 29, 1976. This petition is timely filed within 90 days of that date (28 U.S.C. §2101(c)).

This Court's jurisdiction is invoked under Title 28, United States Code section 1254(1). The district court's jurisdiction was invoked under Title 28, United States Code sections 1331 and 1343.

QUESTIONS PRESENTED

1. Whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?

2. Whether removal of a prisoner as a prison law librarian and termination of a law student-inmate visitation program in which he participated states a cause of action under the Civil Rights Act for either knowingly or negligently interfering with the prisoner's right of access to the courts?

3. Whether deliberate refusal to mail certain of a prisoner's correspondence in 1971-1972 prior to *Procunier v. Martinez,* 416 U.S. 396 (1974), and refusal to send certain correspondence by registered mail

states a cause of action for violation of his First Amendment right to free expression?

STATEMENT OF THE CASE

The litigation below is a pleading nightmare. The second-amended complaint to which the order below is addressed is actually the fourth complaint filed in this action.

On August 14, 1972, plaintiff Navarette, *pro se,* filed the original complaint herein, which was never served on the defendants. This initial action was denominated *Navarette v. Buwalda, et al.,* No. C-72-1259 SW, and was dismissed without prejudice on April 27, 1973.

The second *pro se* complaint—actually the first amended complaint—was filed on October 30, 1972, and was given a different case number, C-72-1954 SW (CT 1-11). That complaint was dismissed without prejudice by order filed February 9, 1973 (CT 192).

With the aid of counsel, a third complaint was filed in open court on April 27, 1973 (CT 193). Navarette had dropped one defendant *(i.e.,* May Buwalda) and added several others *(i.e.,* Procunier and Does I through IV). In response to defendants' motion to dismiss, filed May 25, 1973 (CT 35) the third complaint was withdrawn on July 27, 1973, upon stipulation of counsel that plaintiff file yet another amended complaint in lieu thereof (CT 72-74).

The fourth complaint—the second-amended complaint—was filed January 4, 1974 (CT 90-105). It alleges nine causes of action solely for damages under Title 42, United States Code section 1983.[1] This is the complaint that was acted upon by the district court and the Court of Appeals and which is before this Court on the instant petition. Defendants on February 21, 1974, filed their motions for summary judgment or dismissal (CT 106-162). On May 3, 1974, the district court filed its order granting summary judgment in favor of defendants as to causes of action one, two and three, and dismissing causes of action four through nine, inclusive, for failure to state a federal claim (CT 187). The judgment was filed on June 7, 1974 (CT 189).

Notice of Appeal was filed on June 4, 1974 (CT 188).

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[1]In claims one and two, Navarette alleged in substance that all defendants, in 1971-1972, deliberately refused to mail certain of his letters and refused to send certain other letters in violation of the First Amendment. Claim three alleges that the same actions were done negligently.

Navarette alleged that some 13 items of his mail were not delivered during 1971-1972 (CT 92-94). Prison mail records which were not disputed disclosed that more than 150 items of his correspondence were mailed to attorneys, friends, courts, legislators and other public officials during the same period (CT 121-136).

In claims four and five, Navarette alleges in substance that he was removed as a prison law librarian and that a law student-inmate visitation program in which he participated was deliberately terminated by defendants Procunier, Stone, and Morris, solely to hamper his legal activities. Claim six alleges that the same action was taken in negligent disregard of his legal activities.

In claims seven, eight, and nine, Navarette realleges the substance of counts one through six against defendants Procunier, Stone, and Morris, upon a theory of *respondeat superior*, not personal liability.

The Court of Appeals filed an opinion on February 9, 1976, reversing the order granting summary judgment as to claims one through three, reversing the order dismissing claims four through six and affirming the dismissal of claims seven, eight and nine. Also affirmed was the dismissal of all nine claims for failing sufficiently to allege a conspiracy. One judge dissented from the dismissal of counts four and five.

On February 23, 1976, defendants filed a petition for rehearing and suggestion for rehearing *en banc*. On July 29, 1976, the Court of Appeals filed its order denying the petition for rehearing and rehearing *en banc*. One member of the panel voted to grant panel rehearing and recommended that *en banc* rehearing be granted.

The mandate of the Court of Appeals has been stayed pending certiorari.

REASONS FOR GRANTING THE WRIT

1. California prison officials seek certiorari to determine whether they may be held liable for money damages for mere negligent conduct in the course of their official duties.

Authorities in the circuit courts appear divided. A number require an allegation of wrongful intent, bad faith or oppressive motive. *E.g., Williams v. Vincent,* 508 F.2d 541, 546 (2nd Cir. 1974). Others require only an allegation of recklessness or gross or culpable negligence. *E.g., Jenkins v. Averett,* 424 F.2d 1228, 1231-1232 (4th Cir. 1970). Simple negligence

has not sufficed in the absence of some allegation of knowing or conscious disregard of constitutional rights. The decision of the Court of Appeals herein is the first case to hold that simple negligence in the handling of outgoing prisoner mail states a cause of action under section 1983. The instant decision is in direct conflict with a decision of the Seventh Circuit upholding a district court ruling that simple negligence in the handling of mail does not state a 1983 claim. We refer to *Jenkins v. Meyers,* 338 F.Supp. 383, 389-390 (N.D.Ill.E.D. 1972) affirmed 481 F.2d 1406 (7th Cir. 1973); *also see, Church v. Hegstrom,* 416 F.2d 449, 450-451 (2nd Cir. 1969); *Kent v. Prasse,* 385 F.2d 406 (3rd Cir. 1967).

More significantly, subsequent to the Court of Appeals' decision herein, a majority of this Court rather clearly indicated that negligence did not state a cause of action under the Civil Rights Act. *Paul v. Davis,* 44 U.S. Law Week 4337, 4339 (1976). The majority observed that section 1983 did not serve to make all torts of state officials cognizable in a federal court. *Id.* Indeed, even the dissenting justices in *Paul v. Davis* agreed that section 1983 applied only to "an official's abuse of his position" (quoting *Monroe v. Pape,* 365 U.S. 167, 172 (1961)), and declined to state whether negligence could, under any circumstances, constitute such abuse; the gravamen of "abuse" being intentional conduct.

Under the Court of Appeals' decision, the burden on the federal judiciary of having to bring to trial all such ordinary negligence tort actions under section 1983, regardless of the frivolity of the allegations, could well be staggering. In this regard, it is noted that this Court on February 23, 1976, granted certiorari in *Estelle v. Gamble,* No. 75-929, [516 F.2d 937 (5th Cir. 1975)] wherein the Court of Appeals held that an inmate's claim that he was given improper, impliedly negligent, medical treatment for a back injury, stated a 1983 cause of action. We urge that the issues presented here are sufficiently similar to that in *Gamble* to justify *certiorari* and consolidation for purposes of argument and decision.

2. A 2-1 majority of the Court of Appeals held that Navarette's claims that his removal as a prison law librarian and the termination of a student visitation program in which he participated stated a section 1983 cause of action for interfering with his right of access to the courts. Subsequently, however, this Court in substance has held that removal of a state prisoner from his post of inmate law librarian and his transfer to another prison was an action entirely within the discretion of prison officials, not a matter of constitutional dimension. *Montayne v. Haymes,* 44 U.S. Law Week 5051 (1976). Moreover, as the dissent below points out, the termination of these two privileges, albeit hampering Navarette's opportunity to improve his legal acumen, is not sufficiently related to the right of access to the courts and does not involve a discriminatory denial of prison privileges generally available to other prisoners. Hence, the action taken fails to state a federal claim. *See, Hatfield v. Bailleaux,* 290 F.2d 632, 637, 641 (9th Cir.) *cert. denied sub nom.*

Bailleaux v. Hatfield, 368 U.S. 862 (1961). Certiorari is sought to correct this failure to follow *Montayne.*

3. Certiorari is also sought from the ruling that refusal in 1971-1972 to mail a prisoner's correspondence and to send it by registered mail state a federal claim for damages under the First Amendment.

Petitioners point out that it has not found any case, nor does the Court of Appeals cite any case holding that a prison inmate has a federal constitutional right to send his letters by registered mail.[2] Hence, we respectfully request that certiorari be granted to make it clear that the refusal to permit registered mailing does not state a federal claim under the First Amendment.

The alleged refusal by petitioners to mail certain of plaintiff's letters took place in 1971 and 1972, long before the decisions in the Ninth Circuit holding that prisoners had a right to correspond protected by the First Amendment. *See, Martinez v. Procunier,* 354 F.Supp. 1092, 1097 (N.D.Cal. 1973); *McKinney v. DeBord,* 507 F.2d 501, 505 (9th Cir. 1974). Moreover, this Court expressly declined to hold that inmates had such a right. *Procunier v. Martinez,* 416 U.S. 396, 408 (1974).

It is submitted that proper federal-state relations would require the lower federal courts to refrain from interfering with the discretionary action of state of-

[2]Neither did petitioners' mail regulations allow inmates to send letters by registered mail, except with permission of the warden (CT 145). Thus, any alleged denial thereof to plaintiff by subordinate employees (CT 94:22) does not implicate the equal protection clause.

ficials unless such action offends federal standards announced by the Supreme Court. *See, Rizzo v. Goode,* 44 U.S. Law Week 4095 (1976); *cf., Schneckloth v. Bustamonte,* 413 U.S. 218, 249 (1973). *A fortiori,* where the actions complained of not only fail to implicate a federal right declared by the Supreme Court, but also pre-date the articulation of such a right by the lower courts in this circuit, it is difficult to perceive wherein a federal cause of action can be said to have existed. A prison official "is not charged with predicting the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 557 (1967).

ARGUMENT

We do not present extended argument at this time as to our second and third reasons for the writ. The alleged access to courts claim is persuasively challenged by the dissenting opinion below and requires no repetition. Neither do we elect to belabor our contention that *Procunier v. Martinez* is not retroactive.

Extended discussion below is presented as to our first reason for granting the writ: negligence does not state a cause of action under the Civil Rights Act.

I

NEGLIGENCE IS NOT A PROPER BASIS FOR RELIEF UNDER THE CIVIL RIGHTS ACT

Section 1983 uses the term "deprivation" to describe the wrongdoing which generates liability. A deprivation is an act which dispossesses another of what is

his. In *Monroe v. Pape,* 365 U.S. 167 (1961), the act of deprivation was committed by a group of Chicago police officers who allegedly broke into the plaintiff's home, conducted an abusive and pervasive search and arrested and detained an occupant without cause. Such intentional torts as assault, battery, false imprisonment, invasion of privacy and inflicting of mental distress are implicated, not negligence. *See* Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 Ind.L.J. 5 (1974); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond,* 60 N.W.U.L.Rev. 277 (1965). In *Pierson v. Ray,* 386 U.S. 547 (1967), the act of deprivation was the alleged illegal arrest and imprisonment of assembled clergymen in Jackson, Mississippi, also intentional conduct.

Here, Navarette merely urges in claims three and six that prison officials negligently interfered with his mail and negligently took away certain privileges. The Court of Appeals holds he has therefore sufficiently alleged a "negligent" violation of a constitutional right. We respectfully submit that this ruling has neither historical nor judicial support.

A. The Historical Genesis of the Civil Rights Act Does Not Posit Liability for Negligence.

When the Civil Rights Act is viewed as a whole, and in the context in which it was passed, it is clear that only one specific type of negligence (which is inapplicable herein) was considered actionable. When the civil rights bill (H.R. 320, 42d Cong., 1st Sess. [1871]) was introduced, it did not contain any reference to negligence. Cong. Globe, 42d Cong., 1st Sess. 317 (1871). With minor amendments, the house bill was passed and sent to the Senate on April 6, 1871. It was reported out of committee with amendments on April 10, still without any reference to negligence. *See, id.,* at 567-578.

Subsequently, a joint conference committee was appointed to draft a provision suitable to both houses. The new section drafted by this committee, which became Section 6 of the Civil Rights Act of 1871 (17 Stat. 15), included for the first time a reference to negligence; creating liability in any person who, knowing that any of the acts forbidden under Section 2 (the conspiracy provision, 17 Stat. 13) were about to occur, "and having power to prevent or aid in preventing the same, shall *neglect* or refuse so to do. . . ." Cong. Globe 42d Cong., 1st Sess. 805 (1871) (emphasis added). This provision now appears as Title 42, United States Code section 1986. It is clear, then, that negligent liability was not included in the other provisions of the Act, and that the specific inclusion of negligence in what is now section 1986 was intentional and represented a new and different liability than that otherwise created.

This conclusion is buttressed by the historical context in which the Civil Rights Act arose. As observed in *Monroe v. Pape, supra,* 365 U.S. 167, 172-175 (1961), the Act was largely a response to the activities of the Ku Klux Klan, and the debates in Congress focused upon mob violence. The conduct for which the Act was to provide a remedy was intentional con-

duct—of the type classified as intentional torts. With the exception of that limited form of negligence specified in section 1986, there is nothing in the debates which would suggest that the Act embraced anything more than intentional torts.

B. The Judicial Decisions Have Not Posited Liability for Negligent Torts.

Monroe v. Pape, supra, 365 U.S. 167, 187 (1961), when considering the federal civil liability of police officers charged with an illegal search and arrest, stated in dictum that section 1983 should be read "against the background of tort liability mak[ing] a man responsible for the natural consequences of his acts." The section, of course, must also be read against its own background: "Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted." *District of Columbia v. Carter,* 409 U.S. 418, 425 (1973). Section 1983 speaks expressly neither of "intent" nor of "negligence".

The federal courts have not incorporated negligence concepts into the Civil Rights Act. Closest to the instant case is *Jenkins v. Meyers,* 338 F.Supp. 383 (N.D. Ill.E.D. 1972), aff'd, 481 F.2d 1406 (7th Cir. 1973). The prisoner in *Jenkins* sought injunctive relief and damages against prison officials for negligently failing to mail a trial transcript causing the prisoner to lose a court case. The action was dismissed, the court stating (338 F.Supp. at 389):

> "[T]here is a deprivation of a constitutional right but the act bringing about that violation was an unconscious one, a pure mistake, and the factual

> as well as the legal result were unintended. Thus, not only was there an absence of both improper motive and specific intent—there was no motive and no intent whatsoever since the defendant was not cognizant that the act was taking place no less the legal implications of that act."

The court also stated (338 F.Supp. at 390) that a different result would convert "every minor mistake, especially in the milieu of the prison, into a violation of section 1983. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable." *Also see Weathers v. Ebert,* 505 F.2d 514, 516-517 (4th Cir. 1974); *Davis v. Quarter Sessions Ct.,* 361 F.Supp. 720, 722 (E.D.Pa. 1973); *Beishir v. Schanzmeyer,* 315 F.Supp. 519, 520 (W.D.Mo. 1969).

In *Church v. Hegstrom,* 416 F.2d 449 (2nd Cir. 1969), the plaintiff alleged negligent denial of medical care. The Second Circuit held that ". . . § 1983 likewise does not authorize federal courts to interfere in the ordinary medical practices or other matters of internal discipline of state prisons" and "[m]ere negligence in giving or failing to supply medical attention alone will not suffice, since all rights existing under state law are not also federal rights carrying a federal remedy" (416 F.2d at 450-451). *See also Page v. Sharpe,* 487 F.2d 567, 569 (1st Cir. 1973); *Goode v. Hartman,* 388 F.Supp. 541, 542 (E.D. Va. 1975); *Wilbron v. Hutto,* 509 F.2d 621 (8th Cir. 1975); *Fear v. Pennsylvania,* 413 F.2d 88, 89 (3rd Cir. 1969), *cert. denied,* 396 U.S. 935 (1969); *United*

States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84, 87 (3rd Cir. 1969), *cert. denied,* 396 U.S. 1046 (1970); *Hopkins v. County of Cook,* 305 F. Supp. 1011, 1012 (N.D.Ill. 1969); *Kent v. Prasse,* 265 F.Supp. 673 (W.D.Pa. 1967), *aff'd,* 385 F.2d 406 (3rd Cir. 1967). Similarly, in *Bolden v. Mandel,* 385 F. Supp. 761, 763 (D.Md. 1974), the court said: "[T]here is no constitutional right of a prisoner to be free of simple negligence, particularly where the injury caused does not involve physical harm." *Also see, Johnson v. Glick,* 481 F.2d 1028, 1033 (2nd Cir. 1973).

Courts have used various terminologies to describe the acts of deprivation by the defendant which, though not strictly intentional, will make him accountable. Some courts speak of "gross and culpable negligence." *Jenkins v. Averett,* 424 F.2d 1228, 1231-1232 (4th Cir. 1970); *Rundle v. Madigan,* 356 F. Supp. 1048, 1052-1054 (N.D.Cal. 1972). Some courts speak of "evil intent," "recklessness" or "unreasonable, deliberate indifference". *See, Roberts v. Williams,* 456 F.2d 819, 828 (5th Cir. 1971), *cert. denied,* 404 U.S. 866 (1971), *modified,* 456 F.2d 834 (1972). An example of the latter is an inmate suit alleging that a guard did not protect him from an assault. *Williams v. Vincent,* 508 F.2d 541 (2nd Cir. 1974). The court stated at page 546:

> "In the same way, an isolated omission to act by a state prison guard does not support a claim under section 1983 absent circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control and dependent upon him. [Footnote omitted.]" *Also see, Williams v. Field,* 416 F.2d 483 (9th Cir. 1969).

These cases do not conflict with the general proposition that suits under section 1983 are not intended to redress instances of common law negligence and that there is no right to recovery from the inadvertent invasion of a constitutional right. *See, Paul v. Davis, supra,* 44 U.S. Law Week at 4339. An omission does not create a constitutional deprivation over which the court has jurisdiction. Cases where exceptions have been made invariably involve Eighth Amendment claims. Navarette's complaint does not allege any such special circumstances for a departure from the general rule.

C. The Cases Cited by the Court Do Not Support Its Ruling.

The Court of Appeals cites a string of cases (page 7, note 4) for the proposition that the courts of nearly every circuit have recognized that allegations of negligence state a cause of action for damages under the civil rights acts. These cases require some amplification. None involves a mail dispute or facts similar to the instant case. With one exception,[3] the cases listed involve allegations either of assault, false arrest or other misuse of force and typically required more than simple negligence to find a federal claim stated.

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[3] *McCray v. State of Maryland,* 456 F.2d 1, 5-6 (4th Cir. 1972). There, a claim against a court clerk for negligence in impeding the filing of a writ was held to sufficiently allege a cause of action for denial of access to the courts. *McCray* is thus in direct conflict not only with *Jenkins v. Meyers, supra* [338 F.Supp. 383, *aff'd,* 481 F.2d 1406], but also with *Davis v. Quarter Sessions Ct., supra* [361 F.Supp. 720]. In *Davis,* the court held that a court clerk's alleged negligent failure to furnish a prisoner with a copy of his criminal trial transcript did not state a 1983 claim.

For example, the Court cites *Jenkins v. Averett,* 424 F.2d 1228 (4th Cir. 1970), to support its ruling that negligence states a 1983 cause of action. The *Jenkins* case was an appeal from the findings of the trial court following a trial at which the defendant, a police officer, was found liable for assault and battery under a pendent state claim; a claim under section 1983 was rejected. The Fourth Circuit, one judge dissenting, found that the federal claim should have been considered in that the trial court's finding of "reckless use of force" or "gross or culpable conduct" supplied the intent necessary for federal purposes as well (424 F.2d at 1232). The court, however, stated (424 F.2d at 1232):

> "Our concern here is with the abuse of power by a police officer—as found by the District Judge —and not with simple negligence on the part of a policeman or any other official."

The Court of Appeals also directs attention to *Whirl v. Kern,* 407 F.2d 781 (5th Cir. 1969), *cert. denied,* 396 U.S. 901 (1969) and *Roberts v. Williams, supra,* 456 F.2d 819 (5th Cir. 1971), *cert. denied,* 404 U.S. 866 (1971), *modified,* 456 F.2d 834 (1972). These cases are each procedurally and factually distinct from the instant case.

Whirl involved a former prisoner's suit under section 1983 and pendent state claims against the sheriff for over-extending by nine months "the hospitality of his hostelry and the pleasure of his cuisine" (407 F.2d at 785). The claim was false imprisonment, an intentional tort. The jury was given negligence in-

structions. The jury found that the sheriff was not negligent. On appeal, the prisoner argued that he was entitled to a directed verdict as a matter of law. The court, *inter alia,* found that the sheriff's "good faith" was not a defense to a civil rights action for false imprisonment; that the sheriff was on constructive notice of the illegal confinement after the passage of an unreasonable period of time; that the case should not have been submitted to the jury on the basis of negligence since the prisoner was entitled to a directed verdict.

In the *Roberts* case, *supra,* the plaintiff alleged that he was shot on a prison farm by a trustee guard and a 1983 action was brought alleging cruel and unusual punishment and a pendent claim for negligence under state tort law. The trial court found the superintendent of the farm, Arterbury, liable under both federal and state law. The appellate court found that although the plaintiff alleged but did not prove that the injury was purposely inflicted, the superintendent's "demonstrated indifference to prisoner's safety," established a cruel state of mind with which physical harm and causation provided the basis of Eighth Amendment tort liability (456 F.2d at 838). *Roberts,* however, was subsequently modified (456 F.2d at 835): "We modify our opinion so as to declare that the liability of the defendant, Arterbury, rests upon Mississippi law applied under the doctrine of pendent jurisdiction."

The Court of Appeals also cites *Carter v. Carlson,* 447 F.2d 358 (D.C. Cir. 1971). *Carter* in *dicta* stated

that a police chief and a precinct captain may be held liable under section 1983 if (1) the plaintiff can prove they were negligent in the supervision and training of the police officer who assaulted the plaintiff, and (2) this negligence caused plaintiff to be deprived of a constitutional right. *Carter,* of course, was reversed by the United States Supreme Court, *District of Columbia v. Carter, supra,* 409 U.S. 418 (1973), which held that the District of Columbia was not a state or territory within the meaning of 42 United States Code section 1983. In *Carter,* the Supreme Court declared: "[W]e intimate no view on the merits of respondent's claims insofar as they are based on other theories of liability" (409 U.S. at 418). If negligent conduct were embraced by the Civil Rights Act then this specific reservation would have been unnecessary.

Finally, we would respectfully urge that proper federal-state relations mandate that the lower federal courts desist from imposing negligence liability on state officials in the absence of a decision of the United States Supreme Court clearly imposing such liability. *See, Rizzo v. Goode, supra; cf. Schneckloth v. Bustamonte, supra; United States ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075-1076 (7th Cir. 1970) *cert. denied,* 402 U.S. 983 (1971). Prison officials must retain the "necessary discretion" to experiment "without being subject to unduly crippling constitutional impediments." *Wolff v. McDonnell,* 418 U.S. 539, 566-567 (1974). If a lower federal court feels compelled to announce a landmark decision in federal

law, it should initiate its broadcase on the ground of a federal prison and leave the states to the supervision of their own courts and the United States Supreme Court.

Most significantly, the Court of Appeals' decision is squarely at loggerheads with the strong suggestion of this Court in *Paul v. Davis, supra,* that negligence does not state a cause of action under section 1983.[4]

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant a writ of certiorari and reverse the decision of the court of appeals.

Dated, September 27, 1976.

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[4]Under California Penal Code section 2601(e), state prisoners are able to bring civil suits in state courts.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 74-2212

APOLINAR NAVARETTE, JR., aka PAUL MEDEL NAVARETTE,
Plaintiff-Appellant,

vs.

RAYMOND K. PROCUNIER, T. W. STONE, P. J. MORRIS, B. NEAL, R. KRAMER, W. L. JOHNSON, and Does One through Four,
Defendants-Appellees.

Appeal from the United States District Court for
the Northern District of California

OPINION

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and HILL,* District Judge.

KOELSCH, Circuit Judge:

Appellant Navarette, a California state prisoner, brought this civil rights action against state prison officials under 42 U.S.C. §§1983, 1985 and 28 U.S.C. §§1341, 1343; his complaint set out nine purported

*The Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

claims. The district court granted summary judgment for appellees as to the first, second, and third and dismissed the fourth through ninth for failure to state a federal claim. We affirm in part and reverse in part.

The district court erred in its grant of summary judgment. As to claims one and two, Navarette's allegations in substance were that appellees deliberately refused to mail certain of his letters and to send certain others by registered mail in violation of the federal constitution and the mail regulations then in effect.

The controlling standard, first enunciated by the Supreme Court in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), is that an action may be dismissed for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Although the amended complaint drafted by Navarette's attorney is badly worded and is not entitled to application of the "less stringent" standards reserved for *pro se* pleadings (*Haines v. Kerner*, 404 U.S. 519, 520 (1972)), we nevertheless view the allegations as sufficient to state a claim for the violation of a first amendment right to free expression.

In *Martinez v. Procunier*, 354 F. Supp. 1092 (N.D. Cal. 1973), a case involving the censorship of prisoners' mail pursuant to state prison regulations, a three-judge district court enjoined enforcement of those regulations, holding "that prisoners' right to correspond is a fundamental right protected by the First Amendment, and that restrictions on that right must

be at least reasonably and necessarily related to a valid institutional interest . . . ." 354 F. Supp. at 1097. Reviewing that decision in *Procunier v. Martinez*, 416 U.S. 396 (1973), the Supreme Court affirmed on the narrower basis that unjustified governmental interference with the intended communications violated the first amendment rights, not of the prisoners, but of the non-prisoner correspondents who were party to those intended communications; the Court specifically reserved the question to what extent "an individual's right to free speech survives incarceration . . . ." 416 U.S. at 408.

Nevertheless, this court has indicated in at least two recent decisions that a prisoner does not shed his first amendment right to free expression upon entering the prison gates. *See McKinney v. DeBord,* 507 F.2d 501, 505 (9th Cir. 1974) (opin. of Choy, J.); *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, 480 F.2d 1062, 1065 (9th Cir. 1973). Relying on the language in these decisions and our essential agreement with the rationale of the three-judge court in *Martinez*, we think Navarette's allegations, although inartfully worded, permit proof entitling him to relief.[1]

However, the district court's grant of summary judgment would have been appropriate if there were

[1]We express no opinion as to whether Navarette's allegations of mail interference may state a claim for deprivation of his right to counsel or of access to the courts, *see Ex parte Hull*, 312 U.S. 546, 548-549 (1941); *Christman v. Skinner*, 468 F.2d 723 (2d Cir. 1972); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); of his right to equal protection of the laws, *see Smith v. Schneckloth*, 414 F.2d 680, 681 (9th Cir. 1969); or of his fourth amendment rights, *see United States v. Savage*, 482 F.2d 1371, 1373 (9th Cir. 1973). *Cf. Wolff v. McDonnell*, 418 U.S. 539, 575-577 (1974).

no genuine issue of any material fact or, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant were clearly entitled to prevail as a matter of law. *Stansifer v. Chrysler Motors Corporation*, 487 F.2d 59, 63 (9th Cir. 1973).

In that regard, appellees argue that summary judgment was proper on the ground that a reasonable and good faith belief of a state official that his or her conduct is lawful, even where in fact it is not, constitutes a complete defense to a §1983 claim for damages.

True, the existence of a public officer's "good faith" immunity from §1983 liability has been recognized in a number of situations. *See Wood v. Strickland*, ... U.S. ....., 43 U.S.L.W. 4293 (Feb. 25, 1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951). *See also Williams v. Gould*, 486 F.2d 547, 548 (9th Cir. 1973); *Handverger v Harvill*, 479 F.2d 513, 516 (9th Cir. 1973); *Wimberley v. Campoy*, 446 F.2d 895, 896 (9th Cir. 1971); *Notaras v. Ramon*, 383 F.2d 403, 404 (9th Cir. 1967). But here appellees' assertions that they acted in the good faith belief that they were complying with valid regulations are contradicted by Navarette's affidavits. This raised an issue of fact and precluded summary judgment. *See Wimberley, supra*, 446 F.2d at 896.[2] More-

[2]The existence or lack of good faith—a state of mind which is therefore a subjective fact—generally is not the type of issue that lends itself to resolution, on the basis of affidavits, by summary judgment.

over, the district court may not assume that the defense of good faith is always available. In *Williams v. Gould*, 486 F.2d 547, 548 (9th Cir. 1973), we said that "[g]ood faith is a defense to liability for damages in a suit under section 1983—at least if, and to the extent that, it would be a defense '[u]nder the prevailing view in this country' in common-law actions based on the parallel tort [*citing Pierson v. Ray*, 386 U.S. 547, 555 (1967)]." And in *Wood v. Strickland, supra*, the Supreme Court concluded that § 1983 should be construed to accord school board members a qualified good faith immunity from damages under that section where "common-law tradition" and "strong public-policy reasons" so dictate. Slip-op. at 12. On remand, the district court should determine whether the defense of good faith is available in this action in respect of causes one and two.

The dismissal of claims four and five was error. The substance of those claims was that Navarette was removed as prison librarian and a law-student visitation program in which he participated was terminated solely to punish or hamper his legal activities. The termination or denial of prison privileges because of a prisoner's legal activities on his own behalf or those of other inmates is an impermissible interference with his or her constitutional right of access to the courts. *See Hooks v. Kelley*, 463 F.2d 1210, 1211 (5th Cir. 1972); *Christman v. Skinner*, 468 F.2d 723, 726-727 (2d Cir. 1972). Hence the allegations concerning the removal of Navarette as librarian constituted a

valid claim. Similarly, the termination of the law-student visitation program may well have had the effect of impermissibly burdening Navarette's right of access to the courts. *See Younger v. Gilmore,* 404 U.S. 15 (1971), *affirming Gilmore v. Lynch,* 319 F. Supp. 105 (N.D. Cal. 1970); *Procunier v. Martinez, supra,* 416 U.S. at 419-422; *Johnson v. Avery,* 393 U.S. 483 (1969); *Ex parte Hull,* 312 U.S. 546 (1941).[3]

The district court also erred in granting summary judgment as to the third claim and in dismissing the sixth. The allegations in claim three are to the effect that the acts charged in claims one and two were committed negligently; and such was also the gravamen of the sixth with respect to the acts charged in claims four and five.

In *Williams v. Field,* 416 F.2d 483, 485 (9th Cir. 1969), *cert. denied,* 397 U.S. 1016 (1970), we recognized that it was still an open question in this circuit whether a negligent act can give rise to § 1983 liability. Since then, we have twice noted the issue without deciding it. *See Allison v. Wilson,* 434 F.2d 646, 647 (9th Cir. 1970), *cert. denied,* 404 U.S. 863 (1971); *Cockrum v. Whitney,* 479 F.2d 84, 86 n.1 (9th Cir. 1973).

Section 1983 creates a federal cause of action against "[e]very person who, under color of any stat-

[3]We need not consider whether the alleged termination of the librarianship or the law-student visitation program might constitute a sufficiently significant invasion of Navarette's liberty or property interests requiring the procedural safeguards outlined in *Clutchette v. Procunier,* 497 F.2d 809, 510 F.2d 613 (9th Cir. 1974).

ute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." The section places no narrow limitation on the nature or quality of the conduct which it makes actionable, but concerns itself entirely with the consequences of that conduct. Moreover, the Court indicated in *Monroe v. Pape,* 365 U.S. 167, 187 (1961) that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Reading the statute in the prescribed fashion, we believe that a deprivation of rights need not be purposeful to be actionable under § 1983. *Cf. Cohen v. Norris,* 300 F.2d 24 (9th Cir. 1962) (in banc).[4]

[4]Other circuits are in essential agreement. *See, e.g., Hoitt v. Vitek,* 497 F.2d 598, 602 n.4 (1st Cir. 1974); *Howell v. Cataldi,* 464 F.2d 272, 279 (3d Cir. 1972); *McCray v. Maryland,* 456 F.2d 1, 5-6 (4th Cir. 1972); *Jenkins v. Averett,* 424 F.2d 1228, 1232-1233 (4th Cir. 1970); *Parker v. McKeithen,* 488 F.2d 553, 556 (5th Cir. 1974), *cert. denied,* 419 U.S. 838 (1974); *Roberts v. Williams,* 456 F.2d 819 (5th Cir. 1971), *cert. denied,* 404 U.S. 866 (1971); *Whirl v. Kern,* 407 F.2d 781, 787-789 (5th Cir. 1969), *cert. denied,* 396 U.S. 901 (1969); *Fitzke v. Shappell,* 468 F.2d 1072, 1077 (6th Cir. 1972); *Puckett v. Cox,* 456 F.2d 233, 234-235 (6th Cir. 1972); *Spence v. Staras,* 507 F.2d 554, 557 (7th Cir. 1974); *Byrd v. Brishke,* 466 F.2d 6, 10-11 (7th Cir. 1972); *Joseph v. Rowlen,* 402 F.2d 367, 369-370 (7th Cir. 1968); *Dewell v. Lawson,* 489 F.2d 877, 881-882 (10th Cir. 1974); *Daniels v. Van De Venter,* 382 F.2d 29, 31 (10th Cir. 1967); *Stringer v. Dilger,* 313 F.2d 536, 540-541 (10th Cir. 1963); *Carter v. Carlson,* 447 F.2d 358, 365 (D.C. Cir. 1971), *reversed on other grounds,* 409 U.S. 418 (1973). *But cf. Brown v. United States,* 486 F.2d 284, 287-288 (8th Cir. 1973).

Of course we do not imply that all tortious conduct engaged in by a public official acting under color of state law is subject to redress under § 1983. A § 1983 plaintiff must show that he has been deprived of a federally protected right by reason of that conduct. In the specific context involved here—the administration of state prison systems—federal courts have traditionally been loathe to intervene absent unusual circumstances,[5] and hence the extent to which many federal rights held by ordinary citizens survive incarceration is as yet uncertain. *Cf. Wolff v. McDonnell,* 418 U.S. 539, 555-556 (1974). Nevertheless, here the prisoner's rights which Navarette alleges to have been violated are fundamental and reasonably well-defined; his allegations that state officers negligently deprived him of those rights state a § 1983 cause of action.[6]

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[5]This circuit, like others, *see e.g., Parker v. McKeithen,* 488 F.2d 553, 556 (5th Cir. 1974); *Sostre v. McGinnis,* 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972), has traditionally been reluctant to interfere in matters of state prison administration. *See Williams v. Field, supra,* 416 F.2d at 485. *See, e.g., Mayfield v. Craven,* 433 F.2d 873 (9th Cir. 1970); *Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969); *Stiltner v. Rhay,* 371 F.2d 420 (9th Cir. 1967), *cert. denied,* 387 U.S. 925, 389 U.S. 964 (1967); *Snow v. Gladden,* 338 F.2d 999 (9th Cir. 1964); *Weller v. Dickson,* 314 F.2d 598 (9th Cir. 1963), *cert. denied,* 373 U.S. 930 (1963). *But see Riley v. Rhay,* 407 F.2d 496 (9th Cir. 1969).

Nevertheless, as noted in *Parker v. McKeithen, supra,* 488 F.2d at 556, "it can no longer be correctly asserted that the federal courts are unwilling in all situations to review the actions of state prison administrators to determine the existence of possible violations of constitutional rights." In this context, *see Wolff v. McDonnell,* 418 U.S. 539 (1974), at 555-556 (opinion of the Court) and 593-601 (Douglas, J., dissenting in part).

[6]Summary judgment as to the third cause of action was improper because, as in the case of counts one and two, viewing the evidence in the light most favorable to Navarette, we are unable to say appellees are entitled to prevail as a matter of law.

The district court did not err in dismissing claims seven, eight, and nine. In them, Navarette sought to predicate the liability of defendants Procunier, Stone, and Morris, not on a theory of personal liability, but rather on the doctrine of *respondeat superior.* This court has recognized that, in appropriate circumstances, the Civil Rights Act does contemplate the imposition of vicarious liability where such liability is authorized by state law. *See Hesselgesser v. Reilly,* 440 F.2d 901, 903 (9th Cir. 1971); 42 U.S.C. § 1988. *See also Hansen v. May,* 502 F.2d 728, 730 (9th Cir. 1974); *Boettger v. Moore,* 483 F.2d 86, 87 (9th Cir. 1973). But here the State of California specifically precludes the imposition of such liability by statute. *See* Cal. Gov. Code § 820.8.[7] *Cf.* the Supreme Court's reading of *Hesselgesser* in *Moor v. County of Alameda,* 411 U.S. 693, 704 n.17 (1973).

All nine claims, so far as they purported to be predicated upon 42 U.S.C. § 1985, were properly dismissed. Navarette's pleadings and affidavits failed sufficiently to allege the existence of the conspiracy contemplated by that section. *See, e.g., Griffin v. Breckenridge,* 403 U.S. 88, 102-103 (1971); *Sykes v. State of California,* 497 F.2d 197, 200 (9th Cir. 1974); *Granville v. Hunt,* 411 F.2d 9, 11 (5th Cir. 1969).

Affirmed in part, reversed in part, and remanded.

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[7]The "Legislative Committee Comment—Senate," which follows §820.8, provides in part:

"This section nullifies the holdings of a few old cases that some public officers are *vicariously liable* for the torts of their subordinates." (Emphasis in original.)

HILL, District Judge, concurring in part and dissenting in part.

I concur in the majority opinion except as it relates to the Fourth and Fifth Claims. I would affirm the trial court's dismissal of those causes of action for failure to state a federal claim. I cannot agree either with the characterization of those claims as contained in the majority opinion or with the statements of law made by the majority concerning them. Since the two causes of action allege the same acts in identical language, both will be hereinafter referred to as "the claim".[1]

The majority opinion asserts that the substance of the claim is that Navarette was removed as prison librarian, and that the Stanford law student visitation program in which he participated was terminated, "solely to punish or hamper his legal activities." I submit that this is not a correct statement of the substance of the claim. I quote in full the operative paragraphs of the complaint in the footnote.[2]

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[1]The majority treat the Fourth and Fifth Causes of Action as involving the same legal questions and I agree that they should be so treated. Both claims allege exactly the same actions in identical language except that the Fourth Claim characterizes the actions as having been "deliberately perpetrated . . . in a knowing disregard of plaintiff's constitutional rights . . ." and in the Fifth Claim as being undertaken "in bad faith disregard of plaintiff's constitutional rights . . . [defendants' lacking] probable cause to believe that plaintiff's legal activities thereby interfered with were unprotected . . ." by the U.S. Constitution.

[2]"II

For approximately three months during the fall of 1971, plaintiff held the position of prison law librarian at Soledad, during which time his heightened access to library facilities enabled plaintiff, in addition to fully performing his duties as librarian, to pursue his own legal self-education, and as a consequence, to

The claim begins by alleging that plaintiff held the position of prison law librarian for three months during the fall of 1971. It says that the position was advantageous to him because the increased access to library facilities enabled him to "pursue his own legal self-education" and, in consequence thereof, to prepare writs and pleadings in 12 different cases for himself and others. Late in *1971*, the complaint says, plain-

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prepare semi-adequate writs and pleadings in approximately twelve different cases, on behalf of himself and others.

"III

Starting on or about February, 1972, a small number of Stanford law students, all of whom were acredited for supervised practice, were permitted by the Department of Corrections to visit inmates at Soledad for the purpose of discussing the legal needs and problems of such inmates. Said law students at all times conducted themselves reasonably in connection with such interviews and in no respect abused the privileges under said program. The legal advise and assistance which Plaintiff received as a result of such law students interviews had begun significantly to educate plaintiff, and, as a consequence thereof, to facilitate greatly the large number of legal actions, including the within action, which Plaintiff had been seeking to bring in order to obtain judicial relief both for himself and others.

"IV

Late in 1971, defend*n*ats STONE and MORRIS, both individually and in concert together, abruptly changed plaintiff's job position, and as a proximate result thereof, plaintiff's access to legal books and materials in said library was substantially curtailed. Moreover, in fall, 1972, said defendants, both individually and in concert together, also terminated the visitation program described in the immediately pre*c*eding paragraph, and, as a proximate result thereof, thereby thwarted plaintiff's efforts to acquire an adequate fund of legal knowledge in respect to the legal remedies available to himself and others. In direct consequence of both actions by said defendants as described in the within paragraph, plaintiff was prevented from pursuing in adequate and timely manner, available legal remedies on behalf of himself and others.

"V

Defendants STONE and MORRIS deliberately perpetrated the actions hereinabove described for the purpose of thwarting and impeding plaintiff's acquisition of knowledge of available legal remedies, and did so in knowing disregard of plaintiff's constitutional rights."

tiff's position was "abruptly" taken from him. No separate statement of the defendants' alleged intent or purpose in taking the librarian position away from the plaintiff is made.

The claim then goes on to describe the Stanford law student visitation program and its termination. This act is obviously not related in time to the removal of plaintiff as law librarian. The complaint says that the student visitation program commenced in *February 1972* and was terminated in fall of that year. Plaintiff says that he benefitted from the program because the advice and assistance he received from the students "had begun significantly to educate" him "and thus to facilitate greatly the large number of legal actions" which he had been seeking to bring for himself and others. The termination of the program as alleged was obviously a total termination of it for the entire prison; no other fair reading of the complaint is possible. Again, the claim contains no separate statement of defendants' alleged intent or purpose in terminating the program. Its termination, said plaintiff, "thwarted" his efforts "*to acquire an adequate fund of legal knowledge* in respect to the legal remedies available to himself and others." (Emphasis supplied). Because the termination impeded his self-education, plaintiff says he was "prevented" from pursuing "in adequate and timely manner" available legal remedies on behalf of himself and others.

In characterizing the intent or purpose of defendants' acts, paragraph V sweeps both apparently unrelated acts together and charges that they were

undertaken for the purpose of "thwarting and preventing" plaintiff's acquisition of "knowledge of available remedies . . . ."

What plaintiff has alleged, at most, is that he was discontinued as prison librarian, and the student visitation program was discontinued in the institution, because plaintiff was becoming such a good lawyer and for the purpose of preventing him from becoming a better one.

The majority opinion reads the complaint as making a claim of interference with plaintiff's right of access to the courts. I do not believe it can be fairly so read. In paragraph VI, plaintiff describes the constitutional rights of which he has been deprived by the acts complained of. He includes free speech and due process. But he makes no claim whatever of denial of access to the courts.[3]

The right of access to the courts has been defined by this court as follows:

> ". . . access to the court means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in

[3]It should be borne in mind that this plaintiff is no ordinary prisoner pro per litigation. His pleading is both sophisticated and polished. His choice of language would do credit to a top-level private practitioner specializing in civil rights litigation. The pleading indicates a more than adequate knowledge of constitutional law, particularly the Civil Rights Act, and an awareness of the essential elements of different theories of law which can be used, in different counts, to attack the same actions. Plaintiff's claim in paragraph II of having been working on 12 different cases during the period in question seems credible indeed. So this plaintiff is not entitled to the special advantages afforded to semi-literate unknowledgeable prisoners in scanning their pleadings although, in my view, the result would be the same if he were afforded that advantage.

order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communiications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux,* 290 F.2d 632, 637 (9th Cir.) *cert. den. sub nom Bailleaux v. Hatfield,* 368 U.S. 862 (1961)

The cases establish that the right of access to the courts includes more than the right to prepare, file and prosecute legal actions.

It has also been said that the right of access to the courts ". . . encompass all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore v. Lynch,* 319 F.Supp. 105 (N.D.Cal. 1970) [3-judge court], *aff'd sub nom Younger v. Gilmore,* 404 U.S. 15 (1971).

Among the other related rights which have been held to be necessarily involved in the right of access to the courts are: the right to seek and receive the assistance of lawyers (*Procunier v. Martinez,* 416 U.S. 396 (1974)), the right to the assistance of knowledgeable inmates (*Johnson v. Avery,* 393 U.S. 483 (1969)), and the right of access to a reasonably good set of lawbooks *(Gilmore v. Lynch, supra).* Each of those corollary rights made a part of the general right of access is necessarily and directly related to the prosecution of legal actions. The majority opinion here seems to extend the right of access to the courts to the alleged right to a better legal education, the alleged right to continue as prison law librarian and

the alleged right to continuation of a law student visitor program. I cannot agree that any of these rights are so necessarily and directly related to the general right of access to the courts that they should be made a part thereof. As to the alleged right to become a better lawyer, to pursue a legal education, this court has specifically said in *Hatfield v. Bailleaux, supra,*

> "Inmates have the constitutional right to waive counsel and act as their own lawyers but this does not mean that a non-lawyer must be given the opportunity to acquire a legal education." 290 F.2d at 641.

The statement in the majority opinion that "the termination or denial of prison privileges because of a prisoner's legal activities is an impermissible interference with his or her constitutional right of access to the courts" is unfortunate in two separate respects. First, it equates the indefinite concept of "legal activities" with the right of access to the courts. The term "legal activities" could encompass legal studies unrelated to any specific case or it could encompass the filing and prosecution of an action or it could encompass various activities in between. The term is much too vague and too broad. As stated, I would define access to the courts in the language which this court has previously used in *Hatfield v. Bailleaux,* quoted *supra.* Secondly, it extends the right of access to the courts to activities which are not reasonably related thereto, as aforesaid.

The remainder of my dissent is directed to the following sentence in the majority opinion:

> "The termination or denial of prison privileges because of a prisoner's legal activities is an impermissible interference with his or her constitutional right of access to the courts."

I believe that to be much too broad a statement and one which is not supported by the cases cited. *Hooks v. Kelley,* 463 F.2d 1210 (5th Cir. 1972), is a holding by the Fifth Circuit court that a complaint states a § 1983 claim which charges that the petitioner has been transferred from minimum security to medium security status only because of his persistent use of the courts to attack his conviction and to attack prison conditions. This case involves no termination or denial of a privilege. It involves an attempt to punish or discourage access to the courts by imposing more onerous conditions of incarceration.

Christman v. Skinner, 468 F.2d 273 (2nd Cir. 1972), is a holding by the Second Circuit that a § 1983 claim is sufficient which charged that plaintiff was prohibited from associating with fellow inmates and was denied gym facilities on an equal basis with other inmates because of, and in retaliation for his commencement of court litigation against prison officials. This case does involve a privilege but involves the *discriminatory denial* thereof because the prisoner instituted court law suits. A case much like *Christman* is *Andrade v. Hauck,* 452 F.2d 1071 (5th Cir. 1971). It holds that a § 1983 complaint is sufficient which charges that a prisoner was deprived of commissary privileges as punishment for corresponding with the courts. Again, a privilege generally available to all inmates was denied or terminated in a discriminatory manner as punishment for undertaking court actions.

I believe that a more precise statement of the governing rule is that redress is affordable under §1983 for the *discriminatory* termination or denial of prison privileges generally available to all inmates, undertaken *because* of the prisoner's exercise of his right of access to the courts. This requirement of discriminatory action is specifically recognized in two cases dealing with prisoners' freedom of religion. *Sostre v. McGinnis,* 442 F.2d 178, 189 (2nd Cir. 1971), *cert. den. sub nom Sostre v. Oswald,* 404 U.S. 1049 (1971), 405 U.S. 978 (1972); *Cooper v. Pate,* 378 U.S. 546 (1964), and, in my view, should also be applied to the right of access.

If I have correctly stated the rule of law, the instant case does not fall within it because the face of the complaint shows no discriminatory denial of privileges. No cause of action is stated even if it be assumed that the acts charged were done solely to get at the plaintiff because he was filing so many cases. But, so to read the complaint would be a forced and unreal reading of it.

In the instant case, the student visitation program was cancelled for the entire prison. There was no discrimination against this particular plaintiff involved. It must be conceded that the prison authorities had the discretion to initiate the program and retained the discretion to terminate it at will. In my view, when the non-discriminatory termination of a

prisonwide privilege is alleged, it does not support a complaint under §1983.

As to plaintiff's position as prison librarian, it would again have to be conceded that we are again dealing with a prison privilege. Neither the plaintiff nor any other prisoner has a constitutional right either to be selected as prison librarian, or to remain in that position once selected. Only one prisoner at a time may be the law librarian. Surely the prison authorities retain the right to rotate the position among inmates—they may even have the duty to do so. They would also appear to have the right to discontinue the position entirely. If a given prisoner is not selected for the position, or once given the job is replaced in it by another prisoner, he is not thereby denied a privilege generally available to others. Thus, I would hold that the instant complaint concerning plaintiff's removal from the position does not state a cause of action under §1983.

I would not require prison authorities to undergo the trial of a court action for the termination of either privilege, first, because neither action is sufficiently related to the right of access to the courts, and, even if it is, neither act involves the discriminatory denial of a prison privilege generally available to other inmates.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 74-2212

Apolinar Navarette, Jr., aka Paul Medel Navarette,
Plaintiff-Appellant,
vs.
Jiro J. Enomoto,* T. W. Stone, P. J. Morris, B. Neal, R. Kramer, W. L. Johnson, and Does One through Four,
Defendants-Appellees.

[Filed Jul. 29, 1976]

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and HILL,** District Judge.

Order Denying Petition for Rehearing
and Rejecting Suggestion for Rehearing In Banc

Judges Koelsch and Hufstedler voted to deny the petition for panel rehearing and to recommend against

*During the pendency of this appeal, the appellee Raymond K. Procunier, as Director of the Department of Corrections of the State of California, was succeeded in that office by Jiro J. Enomoto. To reflect this change, the said Jiro J. Enomoto is substituted as one of the appellees in this action, and the caption of the proceeding is amended accordingly.

**The Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

a rehearing in banc. Judge Hill voted to grant the panel rehearing and recommended that the in banc rehearing be granted.

The full court having been duly advised and no judge of the court in active service having requested a vote on the suggestion for rehearing in banc (F. R. App. P. 35(b)), the petition for rehearing is denied, and the suggestion for rehearing in banc is rejected.